MCGUIREWOODS LLP
ALISON V. LIPPA SBN #160807
Two Embarcadero Center, Suite 1300
San Francisco, CA 94111
Telephone: 415.844.9944
Facsimile: 415.844.9922
Email: alippa@mcguirewoods.com

Attorneys for Defendants
THE BANK OF NEW YORK MELLON, fka The Bank of New York as successor trustee to JP Morgan Chase Bank, N.A., as Trustee for the Certificateholders of CWABS, Inc., CWABS Master Trust, Revolving Home Equity Loan Asset Backed Notes, Series 2004-K, and BANK OF AMERICA, N.A.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JAMES W. SCHUBERT, Plaintiff, vs. THE BANK OF NEW YORK MELLON, fka The Bank of New York as successor trustee to JP Morgan Chase Bank, N.A., as Trustee for the Certificateholders of CWABS, Inc., CWABS Master Trust, Revolving Home Equity Loan Asset Backed Notes, Series 2004-K; BANK OF AMERICA, N.A., and DOES 1 through 20, inclusive, Defendants.	**CASE NO. 3:17-cv-00856** **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S REQUESTED PRELIMINARY INJUNCTION** **Complaint Filed: February 8, 2017** **Trial Date: None Set**

I. INTRODUCTION

Plaintiff James W. Schubert ("Plaintiff') is among the worst kind of repeat filers who has willingly and repeatedly misused the legal system for years to interfere with and thwart the proper foreclosure process after he defaulted almost immediately on a $600,000 equity line of credit that he drew down in 2004 against the real property located at 936 Bayview Avenue, Oakland, California 94610 (the "Property"). The present suit is only the latest in a long, long line of prior actions filed by Plaintiff to convolute and cloud title for the Property since he first defaulted on the loan now over ten years ago. After a lengthy multi-year process to again reach the point of foreclosure for the Property, spanning several different suits and a separate declaratory relief action filed by Defendants to establish priority of the liens that encumber the Property, Plaintiff has now yet again filed suit to stop the foreclosure claiming – again – that title should be quieted in him. He now adds a novel theory that the "one form of action rule" bars the present suit. Plaintiff filed the present suit in the Alameda County Superior Court which on February 10, 2017, granted him a temporary restraining order. The state court also set a hearing set for an Order to Show Cause why a preliminary injunction should not issue. Defendants removed the matter to this Court on the basis of diversity jurisdiction on February 21, 2017 and now ask that this Court deny the preliminary injunction. The reason that this Court should not entertain Plaintiff's latest ploy to thwart foreclosure is simple: Plaintiff does not have grounds to support a preliminary injunction. First, he has already litigated his quiet title claims and the present case is barred by the doctrine of *res judicata* and collateral estoppel. Second, the present Complaint fails to state any cause of action against Defendants. The Court should deny Plaintiff's preliminary injunction and allow Defendants to proceed with the foreclosure. At a minimum, if the Court is inclined to allow the preliminary injunction, the Court should order an undertaking that is commensurate with the enormous arrears on this account and not allow Plaintiff to continue to avoid his obligation for the Loan which he has not paid since at least 2007.

II. BACKGROUND

A. The Mortgage Loan and Default.

Plaintiff is a licensed California real estate agent who is sophisticated about the real estate matters at issue in this action. (Compl. ¶ 1). On April 7, 2004, Plaintiff obtained a home equity line of credit, loan number ****6500 for $600,000 from Countrywide Home Loans, Inc. ("CHL") as the original lender (the "Loan"). The Loan was secured by a Deed of Trust and Assignment of Rents

(“Deed of Trust”) recorded on April 13, 2004 (“2004 Lien” or “2004 Deed of Trust”).[1] (Request for Judicial Notice (“RJN”), **Ex. 2 [Deed of Trust and Assignments of Rents])**. As of August 2, 2011, the investor for the Loan at issue in this action is identified in the recorded documents as “THE BANK OF NEW YORK MELLON, fka The Bank of New York as successor trustee to JP Morgan Chase Bank, N.A., as Trustee for the Certificateholders of CWABS, Inc., CWABS Master Trust, Revolving Home Equity Loan Asset Backed Notes, Series 2004-K.” (RJN, **Ex. 3** [**Corporation Assignment of Deed of Trust]**). Bank of America, N.A. is the current servicer of the Loan.

The Deed of Trust listed CTC Real Estate Services as the Trustee. (*Id*.) CHL substituted ReconTrust Company, N.A. (“ReconTrust”) as the trustee under the Deed of Trust in 2010 and 2011, respectively. (RJN, **Ex. 4 [Substitution of Trustee and Assignment Deed of Trust]** and **Ex. 5 [Substitution of Trustee])**. On June 22, 2007, ReconTrust, as trustee, recorded a Notice of Default and Election to Sell Under Deed of Trust reflecting that as of June 20, 2007 the Loan was $85,144.19 in arrears. (RJN, **Ex. 6 [Notice of Default]**). Thereafter ReconTrust recorded a Notice of Trustee Sale on August 2, 2011 and July 19, 2010, respectively. (RJN, **Ex. 7 [Notice of Trustee Sale]** and **Ex. 8 [Notice of Trustee Sale].**) The recorded documents reflect a “Notice of Rescission of Declaration of Default and Demand for Sale and Notice of Default and Election to Sell,” (“Rescission”) recorded on August 22, 2012. (RJN, **Ex. 9 [Rescission]**.

On July 12, 2013, Plaintiff recorded a new Deed of Trust reflecting that he has further encumbered the Property with another loan in the amount of $685,000 taken from a private lender named Xiao Zheng (“2013 Zheng Loan” or “2013 Zheng Deed of Trust”). (RJN, **Ex. 10 [2013 Zheng Deed of Trust]**). On June 22, 2016, BANA and BNYM caused to be recorded a Subordination Agreement with Xiao Zheng establishing that the 2004 Loan takes priority over the 2013 Zheng Deed of Trust. **(RJN Ex. 11 [Subordination Agreement.]**) On November 17, 2016,

---

[1] In 2001 Plaintiff obtained a primary mortgage loan on the Property in the original amount of $300,000 for which World Savings Bank FSB was the original lender (the “Primary Loan”). The Primary Loan is not at issue in this action, and neither BNYM nor BANA have an interest in the Primary Loan. **(Request for Judicial Notice (“RJN” Ex. 1 [Primary Loan Deed of Trust]).**

Zheng assigned the beneficial interest in the 2013 Zheng Loan to an individual named "Edwin J. Heath." **(RJN Ex. 12 [Assignment of 2013 Zheng Loan]).**

On September 29, 2016, BANA caused to be recorded a second Notice of Default ("2016 NOD") which reflects arrears on the Loan of $305,431.91 as of September 27, 2016. **(RJN Ex. 13 [2016 NOD]).** BANA also caused to be recorded a third Notice of Trustee's Sale with a sale date of February 15, 2017 ("2017 Notice of Trustee's Sale"). **(RJN Ex. 14 [2017 Notice of Trustee's Sale])**. On February 10, 2017, Plaintiff obtained from the Alameda County Superior Court a Temporary Restraining Order ("TRO") barring the sale until this Court can consider Plaintiff's motion for a Preliminary Injunction. **(RJN Ex. 15 [TRO]).**

B. Plaintiff Previously Has Filed Numerous Suits Seeking to Stop the Proper Foreclosure of the Property.

The present action is the sixth suit filed by Plaintiff since 2009 against similarly situated defendants, five of which challenge the foreclosure of the Property:

1) *James Schubert v. Countrywide Bank, N.A.*, Alameda County Superior Court Case No. RG09447532, filed on April 17, 2009; dismissed by the Court with prejudice on August 5, 2011 **("*Schubert I*")**;[2]
2) *James Schubert v. Bank of America Corporation and ReconTrust Company, N.A.*, Alameda County Superior Court Case No. RG10525100, filed on July 13, 2010; dismissed voluntarily by Plaintiff without prejudice on August 10, 2010 **("*Schubert II*") (RJN Ex. 16 [*Schubert II* Complaint])**;
3) *James Schubert v. Bank of America Corporation and ReconTrust Company, N.A.*, Alameda County Superior Court Case No. RG10526531, filed on July 20, 2010. **("*Schubert III*") (RJN Ex. 17 [*Schubert III* Complaint]).** The *Schubert III* matter was dismissed voluntarily by Plaintiff without prejudice on September 12, 2012 after

[2] The Complaint in *Schubert I*, unlike *Schubert II-VI*, does not allege claims relating to the foreclosure of the Property but Plaintiff names Countrywide Home Loans, Inc. and raises fraud claims concerning the Loan.

the Court entered an order sustaining defendants' demurrer to the Complaint.;

4) *James Schubert v. Bank of America, N.A. and ReconTrust Company, N.A.*, Alameda County Superior Court Case No. RG12647408, filed September 12, 2012; dismissed voluntarily by Plaintiff without prejudice on February 28, 2013 **("*Schubert IV*") (RJN Ex. 18 [*Schubert IV* Complaint]);**

5) *James Schubert v. Bank of New York Mellon*, Alameda County Superior Court Case No. RG13662247, filed on January 4, 2013. **("*Schubert V*") (RJN Ex. 19 [*Schubert V* Complaint]).** Plaintiff voluntarily dismissed the *Schubert V* matter with prejudice on November 13, 2014 pursuant to settlement **(RJN Ex. 20 [Dismissal with prejudice of *Schubert V*]);** and

6) The present action -- *James Schubert v. THE BANK OF NEW YORK MELLON, fka The Bank of New York as successor trustee to JP Morgan Chase Bank, N.A., as Trustee for the Certificateholders of CWABS, Inc., CWABS Master Trust, Revolving Home Equity Loan Asset Backed Notes, Series 2004-K, and BANK OF AMERICA, N.A.*, Alameda County Superior Court Case No. RG17848649, filed on February 8, 2017, removed to this Court on February 21, 2017 ("*Schubert VI*").

C. In 2014 BANA Filed a Declaratory Relief Action to Determine the Priority of Liens Against the Property.

On November 13, 2014, BANA and BNYM filed in the Alameda County Superior Court, Case No. RG14748045 a declaratory relief action entitled *The Bank of New York Mellon et al. v. James W. Schubert et al.* ("Declaratory Relief Action"). **(RJN Ex. 21 [Complaint in Declaratory Relief Action]).** The Declaratory Relief Action named as defendants Xiao Zheng and James Schubert, and sought a declaration and order from the Court that the 2004 Lien took priority over the 2013 Zheng Lien. Pursuant to settlement, BANA caused to be recorded the Subordination Agreement (RJN Ex. 11), and dismissed the Declaratory Relief Action with prejudice on April 21, 2016. **(RJN Ex. 22 [Dismissal With Prejudice of Declaratory Relief Action]).**

III. LEGAL STANDARD

A preliminary injunction is an "extraordinary remedy." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 376 (2008). The Ninth Circuit has summarized the Supreme Court's clarification of the standard for granting preliminary injunctions in *Winter* as follows: "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Am. Trucking Ass'n, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009); *see also Cal Pharms. Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 849 (9th Cir. 2009). Alternatively, "'serious questions going to the merits' and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011). A "serious question" is one on which the movant "has a fair chance of success on the merits." *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1421 (9th Cir. 1984).

IV. ARGUMENT

A. Plaintiff Does Not Have A Reasonable Likelihood Of Success On The Merits.

In order to demonstrate a right to injunctive relief, Plaintiff must demonstrate that he is "likely to succeed on the merits of its claims" or, at the very least, that he has raised "serious questions going to the merits" of its claims. Plaintiff cannot meet either standard. Plaintiff's claims are barred by the doctrine of res judicata given that they are identical and arise from the same set of facts against the same defendants relating to the foreclosure of the same mortgage loan that was at issue in a previous action filed by Plaintiff which Plaintiff settled with Defendants and dismissed with prejudice and a release of claims. Additionally, Plaintiff fails to state facts sufficient to state any cause of action against defendants.

1. This Action Is Entirely Barred by the Doctrine of Res Judicata.

Plaintiff's claims are all precluded as Plaintiff has litigated them before in the *Schubert V* matter against the same or similarly situated defendants, based on the same foreclosure process for the same real property arising out of the same mortgage loan. Plaintiff agreed to settle his claims in *Schubert V* and dismissed the entire action with prejudice in November 2014. (RJN Ex. 20). The present Complaint is therefore barred by res judicata and must be dismissed.

When applying res judicata to a state court decision, a federal court "give[s] the same preclusive effect to [that] judgment as another court of that State would give," meaning that the federal court will apply res judicata as adopted by that state. *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 523, 106 S.Ct. 768, 88 L.Ed.2d 877 (1986). Under California law, res judicata precludes a party from relitigating (1) the same claim, (2) against the same party, (3) when that claim proceeded to a final judgment on the merits in a prior action. *See Mycogen Corp. v. Monsanto Co.*, 28 Cal.4th 888 (2002); *Adam Bros. Farming, Inc. v. County of Santa Barbara*, 604 F.3d 1142, 1148–49 (9th Cir. 2010). "Res judicata is applicable whenever there is (1) an identity of claims, (2) a final judgment on the merits, and (3) privity between parties." *Id.* "Identity of claims exists when two suits arise from the same transactional nucleus of facts." *Stratosphere Litig. L.L.C. v. Grand Casinos, Inc.*, 298 F.3d 1137, 1143 n.3 (9th Cir. 2002) (internal quotations omitted). In assessing this question, it is well-established that "[u]nder res judicata, the prior judgment is conclusive 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.'" *W. Sys., Inc. v. Ulloa*, 958 F.2d 864, 871 (9th Cir. 1992) (quoting *Nevada v. United States*, 463 U.S. 110, 130 (1983)); see also *Stratosphere*, 298 F.3d at 1143 n.3 ("Newly articulated claims based on the same nucleus of facts may still be subject to a res judicata finding if the claims could have been brought in the earlier action.").

Here, there is unequivocally an identity of claims between the dismissed Complaint in *Schubert V* and the Complaint in the instant matter. Indeed, the entire premise of the *Schubert V* action was Plaintiff's claims that he "paid in full" the 2004 Loan and that BNYM no longer had any interest in the Loan. (See *Schubert V* Complaint generally, RJN Ex. 20). Plaintiff alleged two causes of action in *Schubert V* – slander of title and quiet title based on these allegations. *Id.* The same factual allegations appear now in the *Schubert VI* Complaint in which Plaintiff asserts a cause of action for quiet title because he claims to have satisfied the 2004 Loan. He also alleges a claim for declaratory relief as his second cause of action based on the same facts. (*See Schubert VI* Complaint generally). Accordingly, the first element of res judicata has been met in this case. See *Cortez v. New Century Mortgage Corp*., No. 12-3146 JSC, 2012 WL 3249515, at *3 (N.D. Cal. Aug. 7, 2012) (dismissing claims as barred by res judicata and explaining that “the Complaint in this action is word-for-word identical to the complaint filed in Case No. 11–1019; therefore, Plaintiff's claims arise out of the same nucleus of facts as the earlier case.”).

The other two elements of res judicata are also undisputedly satisfied. First, the *Schubert V* Complaint was brought by the Plaintiff against Defendant BNYM, just like the new Complaint in *Schubert VI*. (RJN Ex. 20; See *Schubert VI* Compl. generally). The new action also names BANA, which is the loan servicer and thus the agent for BNYM. Accordingly, the privity element has been satisfied as to BNYM and BANA. See *Nnachi v. City of San Francisco*, 2010 WL 3398545 *6 (N.D. Cal. Aug. 27, 2010) aff'd sub nom. *Nnachi v. City & County of San Francisco*, 467 F. App'x 644 (9th Cir. 2012) (“[i]f the parties in the first suit are exactly the same as the parties in the second, then this element is met.”) (internal citations omitted). Although Plaintiff also adds BANA to the current suit, privity still exists as to both entities. See *Caballero v. Doan*, No. 13-CV-05756-BLF, 2014 WL 3950899, at *6 (N.D. Cal. Aug. 11, 2014) (holding that a loan servicer and the holder of the deed of trust are in privity for purposes of res judicata).[3]

Second and finally, there is no question that the *Schubert V* action resulted in a final judgment on the merits. A dismissal with prejudice is the equivalent of a final judgment on the merits, barring the entire cause of action. See *Alpha Mechanical, Heating & Air Conditioning, Inc. v. Travelers Casualty & Surety Co. of America*, 133 Cal.App.4th 1319, 1332 (2005); *Torrey Pines*

---

[3] Even if BANA were not in privity with BNYM, the Complaint would still fail as to them under the doctrine of collateral estoppel because the claims are identical to those previously litigated. *See In re Bugna*, 33 F.3d 1054, 1057 (9th Cir. 1994) (collateral estoppel bars relitigation when the issue decided in the prior action is identical to the issue presented in the second action; there was a final judgment on the merits; and the party against whom estoppel is asserted was a party to the prior adjudication).

Bank v. Superior Court, 216 Cal.App.3d 813, 820–821 (1989); *Roybal v. University Ford* (1989) 207 Cal.App.3d 1080, 1086–1087 (1989); *Palmquist v. Palmquist*, 212 Cal.App.2d 340, 343–344 (1963). As the court explained in *Roybal, supra*, 207 Cal.App.3d at pages 1086–1087: "The statutory term 'with prejudice' clearly means the plaintiff's right of action is terminated and may not be revived.... [A] dismissal with prejudice ... bars any future action on the same subject matter." See also *Boeken v. Philip Morris USA, Inc.*, 48 Cal.4th 788, 793 (2010).

Thus, Plaintiff's voluntary dismissal of his claim against BNYM in the *Schubert V* action "constituted a retraxit and determination on the merits invoking the principles of res judicata[.]" (*Torrey Pines*, 216 Cal.App.3d at 819. Therefore, the second element of res judicata is met because Plaintiff dismissed the Complaint in *Schubert V* with prejudice, which serves as a final adjudication for res judicata purposes. Accordingly, Plaintiff fails to establish that it is likely he will prevail on the merits of his quiet title claim because the Complaint is barred in its entirety based on res judicata and/or collateral estoppel.

2. The Complaint Is Uncertain And Fails To State Facts Sufficient To Constitute A Cause Of Action

Even if the Court does not find that res judicata bars this action, the Complaint fails and must be dismissed without leave to amend for the following reasons.

a. Plaintiff's Quiet Title Cause of Action Fail. (COA 1)

Plaintiff contends that he is "the owner in fee," (Compl. ¶ 23), and that he holds "fee simple title" to the Property. (Compl. ¶ 24). He bases two of his three causes of action in the Complaint – the first for quiet title and the second for declaratory relief on the claim that he paid the loan in full "years ago" (Compl. ¶ 27), and that Defendants no longer have any interest in the loan or Property. The Complaint attaches a "legal description" of the Property as Exhibit A. (Compl. ¶ 23). The basis of Plaintiff's claimed title is the allegation that he paid the 2004 Loan in full. (See Compl. generally). The Complaint further seeks a declaration that quiets title to the Property in Plaintiff and states that "Defendants have no valid lien against it." (See Compl. at Prayer for Relief, ¶ 1).

Plaintiff's allegations fail to state a cause of action for quiet title. To state a cause of action for quiet title, Plaintiff must include: 1) a description of the subject property; 2) the title of Plaintiff as to which determination is sought and the basis of the title; 3) the claims adverse to the title of the Plaintiff against which a determination is sought; 4) the date as of which the determination is sought; and 5) a prayer for determination of the title of the Plaintiff against adverse claims. Cal. Civ. Proc. Code §§ 760.020(a)-(e). "If the plaintiff fails to show any legal interest in the property in controversy, and as to which he asserts title, he must fail altogether…" *Wright v. City of Morro Bay* (2006) 144 Cal.App.4th 767, 775. As the court held in *Leeper v. Beltrami* (1959) 53 Cal.2d 195, 216:

> Quieting title is the relief granted once a court determines that title belongs in plaintiff. In determining that question, where a contract exists between the parties, the court must first find something wrong with that contract. In other words, in such a case, the plaintiff must show he has a substantive right to relief before he can be granted any relief at all. (Emphasis added).

Plaintiff fails to establish his title to the Property and fails to allege any basis at all for his claim to legal title. (*See generally*, Complaint). The Complaint attaches no documents that establish that Plaintiff holds title to the Property, such as a Deed of Trust or other deed. Further, the Complaint recites no facts that address Plaintiff's claim that title should be quieted in him or that Defendant has no interest in the Property. He provides no basis for his claim that BNYM lacks any interest in the Property, and fails to refute the presumption of validity of any of the recorded documents relating to the Property. He fails to explain his baseless conclusion, or attach or reference documents establishing that he "paid off" the Loan or that any individuals with a criminal background allegedly drew down on his line of credit instead of himself. (See Compl. at ¶ 10). The recorded documents refute this claim and Plaintiff asserts nothing in the Complaint other than his bare conclusion allegations that contradict the fact that he defaulted on the Loan in 2007. Based on this record, therefore, he remains in default because he has not cured the default and the Loan was not reconveyed to him.

Even if Plaintiff were to try to amend to assert any facts to substantiate his asserted right to the Property – which this Court should not permit him to do without leave of court for the reasons stated above -- he could not cure the defects in the Complaint. A borrower cannot quiet his title against a lender without tendering payment of the debt secured by the mortgage or deed of trust. *Miller v. Provost* (1994) 26 Cal.App.4th 1703, 1707 ("a mortgagor of real property cannot, without paying his debt, quiet his title against the mortgagee."); *Leonard v. Bank of America*., (1936) 16 Cal. App.2d 341, 342-343 ("It is settled in California that a mortgagor cannot quiet his title against the mortgagee without paying the debt secured." Thus, such tender must be alleged. *See, e.g., Edwards v. Wachovia Mortg.*, 2011 U.S. Dist. LEXIS 13111, at 12 (S.D. Cal. Feb. 10, 2011). . Plaintiff has not alleged any tender of repayment of the loan referenced in paragraph 8 of the Complaint nor has he alleged his ability to tender. The Complaint merely asserts Plaintiff's contention that he paid the loan in full "years ago." (Compl. ¶ 27). There is no indication that Plaintiff has in fact made any payments to cure his default or that any reconveyance has been recorded. Plaintiff states nothing further to clarify this statement. As the court noted in *Stebley v. Litton Loan Servicing, LLP*, 202 Cal.App.4th 522, 526 (2011), to allege a viable claim for attacking a foreclosure sale based upon equitable principles, a complaint must allege more than just an offer to tender. The complaint must demonstrate that there already has been a full tender of the debt. Otherwise the borrower receives a windfall by obtaining real property and evading a lawful debt. (*Id*.) Without a credible allegation of tender, or an excuse as to why tender is not necessary, Plaintiff's mere assertion that the loan is "paid off" is insufficient and his quiet title claim fails. Accordingly, Plaintiff cannot show that he is likely to prevail on the merits of his quiet title claim and the preliminary injunction should be denied.

b. Plaintiff's First Declaratory Relief Cause of Action Fails. (COA 2)

This cause of action is improper because declaratory relief is a remedy, not an independent cause of action. *See Morongo Band of Mission Indians v. California State Board of Equalization,* 849 F.2d 1197, 1201 (9th Cir.1988) ("The Declaratory Judgment Act merely creates a remedy in cases otherwise within the court's jurisdiction; it does not constitute an independent basis for jurisdiction.”). Since the other two causes of action fail as explained herein, Plaintiff is not entitled to any remedy, much less one for declaratory relief.

Here, Plaintiff asserts no new facts in support of an independent claim for declaratory relief, but rather bases the action on the same failed theories raised throughout the Complaint that “Defendants” claim an adverse interest in the Property and that Plaintiff paid the 2004 Loan in full. (Compl. ¶ 27). As discussed in detail above, these claims are barred by *res judicata* and Plaintiff fails to properly plead a cause of action for quiet title. The remedy Plaintiff seeks is not available against Defendants, and his claim lacks any current justiciable controversy. Therefore, his second cause of action fails and Plaintiff cannot show he is likely to prevail on the merits of his case. The preliminary injunction should be denied.

c. The “One Form of Action Rule” Does Not Bar the Foreclosure. (COA 3)

Plaintiff claims in the third cause of action for declaratory relief that Defendants cannot pursue non-judicial foreclosure against Plaintiff because Defendants failed to include a cause of action for foreclosure in the Declaratory Relief Action which sought a court order to establish the priority between the 2004 Lien and the 2013 Zheng lien. (*See* Compl. ¶¶ 31-32). This is a misreading of the rule as set forth in Cal. Code of Civil Procedure § 726. Section 726 states that “[t]here can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property . . . in accordance with the provisions of this chapter.” *See* Cal. Code Civ. Proc. § 726(a).

An “action” for purposes of Section 726 does not encompass a nonjudicial foreclosure. As stated in *Shin v. Superior Court*, 26 Cal. App. 4th 542 (1994), an “action” for purposes of Section 726 is defined pursuant to Section 22 of the California Code of Civil Procedure, which reads “[a]n action is an ordinary proceeding ***in a court of justice*** by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.” *Shin, supra*, 26 Cal. App. 4th at 546 (emphasis added).

Here, Plaintiff's argument is nonsensical. Defendants could not have included a claim for non-judicial foreclosure in their Declaratory Relief Action to establish priority of liens because that case never went forward. It was resolved through a negotiated settlement and was dismissed with prejudice. (RJN Ex. 22). No judgment was ever entered in the case. Additionally, even if it the case had been fully litigated, Plaintiff's argument has been soundly and expressly rejected by the Ninth Circuit and state courts throughout California. *See Resolution Trust Corp. v. Bayside Developers*, 43 F.3d 1230, 1243 (9th Cir. 1994) ("A nonjudicial foreclosure sale is ***not*** an action within the meaning of section 726.") (emphasis added); *accord Birman v. Loeb*, 64 Cal. App. 4th 502, 509 (1998) ("A nonjudicial foreclosure is not an 'action' within the meaning of sections 22 and 726; hence, a nonjudicial foreclosure does not violate section 726.").

Therefore, Plaintiff has not shown that he is likely to prevail on the merits of his third cause of action for declaratory relief and the preliminary injunction should be denied.

V. IF AN INJUNCTION IS ISSUED, A BOND SHOULD BE REQUIRED.

If the Court issues an injunction, Plaintiff should be ordered to post a bond in the amount of his indebtedness prior to the injunction becoming effective. According to the 2016 Notice of Default, Plaintiff was $305,431.91 in arrears as of September 27, 2016. (RJN Ex. 13). Alternatively, Plaintiff should be ordered to make monthly payments under the terms of his Note. Plaintiff argues that he should be required to pay a bond of only $1,000 (although not expressed in his Application, presumably Plaintiff does not mean $1,000 *per month* which would be low given the amount of debt, the arrears and the stage of the proceedings with Plaintiffs numerous prior suits to stall foreclosure). (See Application at 7:9-16.)

Under these facts, a bond is required and necessary to protect Defendants' secured interest in the Property. Plaintiff has not paid his Loan obligation since at least June 2007 when the first Notice of Default was recorded. (RJN Ex. 6). Plaintiff has repeatedly filed suit to thwart the legitimate foreclosure process for this Property. By his own admission, he accepted settlement money from Defendants to dismiss his last suit, *Schubert V*. Even then, Plaintiff has reneged on his agreement to accept the foreclosure, and has filed a new suit alleging meritless claims that have already been adjudicated and dismissed. It is therefore clear that Plaintiff has no intention of negotiating with Defendants or resuming payments under their Note. Plaintiff has had the benefit a home for over ten years without paying under his note while Defendants have been harmed by not receiving payment on the Loan. Plaintiff is requesting the drastic relief of an injunction against Defendants' ability to pursue their rights under the 2004 Deed of Trust without the possibility of ever receiving payment on the Loan since Plaintiff just repeatedly files suit. Plaintiff apparently intends to remain in the Property indefinitely without paying under the Note. Therefore, if the Court grants the Preliminary Injunction, Plaintiff should be ordered to post a bond of a substantial amount to reflect either his arrears, or to approximately the monthly payment required for the Loan.

VI. CONCLUSION

Plaintiff has not demonstrated that he will suffer irreparable injury or that he will succeed on the merits of this case. Therefore, Defendants request that Plaintiff's application for a preliminary injunction be denied or, in the alternative, that he be required to post a significant bond.

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

/ / /

DATED: February 21, 2017

Respectfully submitted,

MCGUIREWOODS LLP

By: /s/ *Alison V. Lippa*

Alison V. Lippa
Attorneys for Defendant
THE BANK OF NEW YORK MELLON, fka The Bank of New York as successor trustee to JP Morgan Chase Bank, N.A., as Trustee for the Certificateholders of CWABS, Inc., CWABS Master Trust, Revolving Home Equity Loan Asset Backed Notes, Series 2004-K, and BANK OF AMERICA, N.A.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California. I am over the age of eighteen years and not a party to the within action; my business address is Two Embarcadero Center, Suite 1300, San Francisco, CA 94111.

On February 21, 2017, I served the following document(s) described as

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S REQUESTED PRELIMINARY INJUNCTION

on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

Daniel A. Grout
Grout Law Firm
3701 Balfour Avenue
Oakland, CA 94610
T: 510-837-7240
F: 510-444-4223

Attorney for Plaintiffs James W. Schubert

☐ **BY MAIL:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service that same day in the ordinary course of business. Such envelope(s) were placed for collection and mailing with postage thereon fully prepaid at San Francisco, CA, on that same day following ordinary business practices. (C.C.P. § 1013 (a) and 1013(a)(3))

☒ **BY FEDERAL EXPRESS OVERNIGHT DELIVERY:** I deposited such document(s) in a box or other facility regularly maintained by the Fed Ex overnight service carrier, or delivered such document(s) to a courier or driver authorized by the Fed Ex overnight service carrier to receive documents, in an envelope or package designated by the Fed Ex overnight service carrier with delivery fees paid or provided for, addressed to the person(s) served hereunder. (C.C.P. § 1013(d)(e))

☐ **BY HAND DELIVERY:** I delivered such envelope(s) by hand to the office of the addressee(s). (C.C.P. § 1011(a)(b))

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 21, 2017, at San Francisco, CA.

Monica J. Steele